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No. 92-___

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA

v.

RICHARD STEINMETZ,

Petitioner

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Can the United States abandon a public vessel under the admiralty's law of finds?

II

Does the Repudiation Clause of the Fourteenth Amendment bar the United States from succeeding to title to the wreck of the Confederate ship ALABAMA?

III

Did the United States capture the CSS ALABAMA under the law of naval prize?

LIST OF PARTIES

In addition to the named parties, briefs *amicus curiae* were filed below by the American Sport Divers Association (with the Federation of Metal Detector & Archeological Clubs, Alliance for Maritime Heritage Conservation, International Scuba Association, Eastern Dive Boat Association, North-South Trader Civil War Magazine) on behalf of appellant-Petitioner, and the National Trust for Historic Preservation in the United States (with the Society of Professional Archeologists, Society for Historical Archaeology, Advisory Council on Underwater Archaeology, Society for American Archeology, and Council of American Maritime Museums) on behalf of appellee-Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner Richard Steinmetz respectfully prays that a writ of certiorari issue to review the August 21, 1992, judgment and opinion of the United States Court of Appeals for the Third Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Third Circuit of August 21, 1992, *United States* v. *Steinmetz*, slip op. 1 (3d Cir. Aug. 21, 1992), is reported at 973 F.2d 212 (3d Cir. 1992), and is reprinted in the appendix hereto, at Pet. App. 1, infra. A Petition for Rehearing was denied on September 18, 1992. *See* 1992 U.S. App. Lexis 22,909.

The opinion and judgment of the U.S. District Court for the District of New Jersey, Judge Debevoise presiding, of May 13, 1991 (as amended on June 3, 1991), was reported at 763 F. Supp. 1293 (D.N.J. 1991), and is reprinted in the appendix, at Pet. App. 29, infra.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Third Circuit of August 21, 1992. A Petition for Rehearing was denied on September 18, 1992. The Supreme Court has jurisdiction to review cases from the federal Courts of Appeals by virtue of 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1333.

CONSTITUTIONAL PROVISIONS INVOLVED

The Property Clause of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

The Repudiation Clause of the Fourteenth Amendment provides that "Neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, . . . but all such debts, obligations and claims shall be held illegal and void." U.S. Const. amend. XIV, § 4.

STATEMENT OF THE CASE

1. This is a summary replevin action brought by the United States to recover the bell of the CSS ALABAMA, which was in the possession of the Petitioner, Richard Steinmetz. The historical background of this case has been well-rehearsed in the opinions of the District Court and Court of Appeals. *See United States* v. *Steinmetz*, 973 F.2d 212, 213-15 (3d Cir. 1992), Pet. App. 3-10; 763 F. Supp. 1293, 1294-97 (D.N.J. 1991), Pet. App. 30-39. It needs only be said here that the ALABAMA was the most-feared -- and successful -- of the Confederacy's commerce raiders during the American Civil War. The ALABAMA was laid and outfitted in the English port of Liverpool in 1862, in apparent violation of Britain's neutrality in the Civil War. For the next two years, the CSS ALABAMA managed to destroy or capture 64 Union merchant vessels, along with a significant

amount of cargo owned by neutral nations. *Id.*, 973 F.2d at 214, Pet. App. 4-5; 763 F. Supp. at 1294-95, Pet. App. 31-32.

The Union navy sought to locate and engage the ALABAMA, and thus bring to an end its costly and disruptive depredations of American shipping. The Union finally had its chance in June 1864 when the USS KEARSARGE found the CSS ALABAMA taking on provisions in the French port of Cherbourg. An offer of battle was made by Captain John Winslow of the KEARSARGE, and accepted by Captain Raphael Semmes of the ALABAMA. The ensuing engagement was short, bloody, and decisive: the KEARSARGE's superior handling and armament overwhelmed the ALABAMA. The CSS ALABAMA sank in international waters. At no point, however, did the Stars and Stripes fly over the ALABAMA, nor was a prize crew from the KEARSARGE placed in possession or control of the Confederate commerce raider, nor had the rebel vessel obeyed the orders of the victorious Union vessel. *Id.*, 973 F.2d at 215, Pet. App. 6; 763 F. Supp. at 1295-96, Pet. App. 35-37.

Substantial historical doubts remain whether Captain Semmes of the ALABAMA *ever* intended to surrender his ship to the KEARSARGE, and whether an offer of surrender was, in fact, made by Semmes and accepted by Captain Winslow. Captain Semmes and his bridge party escaped to a waiting English packet, the DEERHOUND, which took them to Britain; Semmes thence made his way back to the embattled South where he served the rebellion until Lee's surrender at Appomatox and the subsequent collapse of the Confederacy in 1865. *Id.*, 973 F.2d at 215, Pet. App. 6; 763 F. Supp. at 1296-97, Pet. App. 37-38.

2. The wreck of the CSS ALABAMA remained lost

and undiscovered until 1936, when a hard-hat diver, William Lawson from Britain's Channel Island of Guernsey, found the wreck in international waters and recovered its bell. The date is significant: the district court found that 1936 was the year of the bell's removal from the ALABAMA, and the court of appeals did not disturb that finding. *See id.*, 973 F.2d at 215, Pet. App. 7; 763 F. Supp. at 1297, Pet. App. 39. The bell was apparently traded by Lawson for drinking privileges at a Guernsey pub, and there it remained through World War Two. After the War, it passed through the hands of a number of people, until an antiques dealer in Hastings, England, sold it to Richard Steinmetz in 1978. *Id.* After verifying the authenticity of the bell, Steinmetz offered it to the U.S. Naval Academy. The Navy declined, and the bell remained in Steinmetz's possession until he put it up for auction at the Harmer Rooke Gallery in New York in December 1990. *Id.*, 973 F.2d at 215, Pet. App. 8; 763 F. Supp. at 1297, Pet App. 39.

After the Naval Historical Center of the United States Navy received notice of the bell being offered for sale, the United States claimed that the bell was its property and filed a complaint in admiralty in the U.S. District Court for the District of New Jersey. In response to an order to show cause, Steinmetz delivered the bell to the district court.

3. a. The basis of the United States' summary replevin claim over the bell of the CSS ALABAMA was that the Union had acquired title over the wreck by virtue of either capturing the vessel under the law of naval prize *or* because the United States had succeeded to title to all Confederate public property upon the final suppression of the Great Rebellion. Cross-motions for summary judgment were made. The district court, Judge Debevoise presiding, agreed that the United States had acquired title to the wreck in both

fashions, and, having acquired title to the ALABAMA in either 1864 (the year of its sinking) or 1865 (the last year of the Civil War), it cannot be presumed to have abandoned title subsequently. *Id.*, 763 F. Supp. at 1297-99, Pet. App. 40-46.

In addition, the district court rejected, for lack of jurisdiction, Steinmetz's counterclaims that *if* the United States had good title to the bell, that he would be entitled to compensation under *quantum meruit* or unjust compensation theories. *Id.*, 763 F. Supp. at 1299-1301, Pet App. 46-48. Mr. Steinmetz chose not to appeal the rejection of his counterclaims. *Id.*, 973 F.2d at 216, Pet. App. 9.

b. The Court of Appeals for the Third Circuit affirmed. In an opinion, *per* Sloviter, C.J., the court of appeals declined to rule on whether the United States had acquired title by capture, acknowledging that the ALABAMA was never placed in the possession of the Union, and noting that the district court's reliance on the government's "constructive capture" theory may have been misplaced. *Id.*, 973 F.2d at 217-18, Pet. App. 13.

Instead, the Third Circuit ruled that inasmuch as the United States had succeeded to all the public property of the Confederacy, the ALABAMA became the property of the United States in 1865. The court of appeals rejected Steinmetz's argument that because the Union treated the CSS ALABAMA as a pirate, and since pirate vessels are not a form of public property, the United States could not succeed in title. Likewise, the Third Circuit dismissed Steinmetz's constitutional claim that the Repudiation Clause of the Fourteenth Amendment evinced an abandonment of a claim to the ALABAMA, because of the international liabilities that were attached to the vessel. Finally, the court held that, once vested in the United States, title had never been subsequently

abandoned in the wreck of the ALABAMA. *Id.*, 973 F.2d at 218-23, Pet. App. 13-27.

c. Both the district court and the court of appeals, in giving the United States title to the bell of the ALABAMA, indicated openly that they were troubled by the inequity of the situation. *Id.*, 973 F.2d at 223, Pet. App. 27-28; 763 F. Supp. at 1300 n.2, Pet. App. 49. After all, Mr. Steinmetz had, at some time and expense, repatriated a valuable piece of American naval history to this country, and had immediately sought to trade it to the Navy in exchange for other, suitable antiques. The United States asserted outright ownership more than a decade later. Despite these concerns, the lower courts felt constrained to rule in favor of the United States.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES HAS CONSTITUTIONALLY ABANDONED ANY CLAIM TO THE BELL OF THE CSS *ALABAMA* AND SIMILARLY SITUATED PROPERTY.

If this case presented only intriguing historical questions and a chance to revisit obscure legal doctrines, Petitioner would be reluctant to seek review in this Court. But at issue here are some fundamental constitutional limits about the manner in which the United States acquires property and how it later abandons it. Petitioner believes that the court of appeals erred in rejecting the argument that the Repudiation Clause of the Fourteenth Amendment prevented

the United States from acquiring Confederate property encumbered with obligations, as the CSS ALABAMA certainly was. And even if the United States had acquired title to the wreck of the ALABAMA (by either capture or succession), the Property Clause of article IV of the Constitution subjects the United States to the law of finds, where Congress has failed to enact "needful Rules and Regulations" concerning the abandonment of public property.

1. a. Petitioner has consistently argued that the plain language of section 4 of the Fourteenth Amendment barred the United States from succeeding to title to property owned by the Confederacy for which there was a corresponding liability or obligation.[1] The Repudiation Clause of the Fourteenth Amendment provides: "Neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, . . . but all such debts, obligations and claims shall be held illegal and void." U.S. Const. amend. XIV, § 4.

The Third Circuit appeared to accept the notion that the United States could only succeed to Confederate public property for which there were no corresponding obligations. The court of appeals concluded that the "succession doctrine [only] require[d] the United States to succeed to the Confederacy's debts [that were] []related to the particular property at issue." *United States* v. *Steinmetz*, 973 F.2d at

[1] Petitioner does not dispute that the Confederacy, although granted only insurgency status by the Union, was capable of acquiring public property. Petitioner will continue to maintain before this Court, however, that the CSS ALABAMA was treated by the Union as a pirate vessel, and pirate vessels cannot be assimilated to public property, and are thus incapable of being succeeded to. Moreover, Petitioner doubts that the sunken wreck of the ALABAMA was "property" in the sense contemplated in the doctrine of succession.

221, Pet. App. 23.

b. The Third Circuit's decision went on to conclude that because "Steinmetz does not allege that the ALABAMA was not fully paid for by the Confederacy," *id.*, he failed to show that there were existing liabilities related to the ALABAMA. This statement overlooked Petitioner's argument that the outstanding obligation against the ALABAMA was its responsibility for the destruction of neutral ships and capture of neutral property during the course of its commerce raiding.

In some detail, the Petitioner had documented that the United States would have been liable, under the international law of State responsibility, for the unlawful acts of the ALABAMA against neutral shipping and cargo, *had* the United States asserted title to the wreck of the CSS ALABAMA by virtue of succession. Indeed, the position of the United States, at the conclusion of the Civil War in 1865, was that a government successful in suppressing an insurrection was nonetheless liable for the acts of the rebel forces, done in violation of international law, if there was a purported succession to title to the relevant assets of the rebellious authority.[2] This statement of international law being reaffirmed in 1865, the United States was certainly aware that it would be held internationally liable to other nations for the ALABAMA's destruction of neutral ships and

[2] This was the holding of the *Atlantic and Hope Insurance Companies* Claim (U.S. v. Ecuador), *reprinted in* 3 John Bassett Moore, *History and Digest of International Arbitrations to Which the United States has been a Party* 2731 (1898) (award of Aug. 17, 1865). The international arbitral tribunal accepted the United States' argument on this point, see *id.* at 2734-35, although it disallowed the American claim for other, technical reasons. *See id.* at 2738-40.

captures of neutral cargoes.[3]

c. The Third Circuit chose to ignore this significant aspect of the Petitioner's Fourteenth Amendment argument. Among the purposes of the Repudiation Clause was to declare that the United States would not pay foreign holders of Confederate bonds, nor be responsible for any other Confederate acts carried out in pursuit of rebellion. *See* J. James, *The Framing of the Fourteenth Amendment* 24-26 (1956); B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 282-85 (1914) (excerpting discussions in Congress concerning the rationale for section

[3] The depredations of the ALABAMA on the high seas were well known to the United States in 1865. Although the Confederate crew of the ALABAMA sought to destroy only Union ships, and to capture only Union cargoes, it was usually impossible for them to accurately differentiate between a hostile ship and a neutral vessel, and to separate contraband from immunized cargo on board the same merchant ship. As a consequence, there are numerous, documented cases where the ALABAMA violated the international rights of other nations.

A whaling vessel, sailing under the flag of the then Republic of Hawaii, was sunk by the ALABAMA. The crew of the ALABAMA incorrectly believed the ship was really owned by United States nationals. *See* 5 J.B. Moore, *International Arbitrations*, at 4653. The ALABAMA also destroyed a cargo of guano, owned by Peruvian nationals, on board a captured American ship. *See id.*

After the Civil War, the Hawaiian and Peruvian nationals sought indemnity from the United States, under the Acts of June 23, 1874, 18 Stat. 245, and March 6, 1876, 19 Stat. 6. But in both instances the domestic claims commission refused to indemnify the foreigners because Congress had specifically ordered that the United States would not be liable, pursuant to section 4 of the Fourteenth Amendment, for the acts committed by the ALABAMA against neutral shipping. *See* 5 J.B. Moore, *International Arbitrations*, at 4653; *see also* 18 Stat. 248 (§ 12 of 1874 Act).

4 of the Fourteenth Amendment).

Had the United States claimed title to the CSS ALABAMA, and had it subsequently been sued for damage caused by the rebel raider, the United States would have disclaimed liability under the Fourteenth Amendment. Now that claims resulting from the ALABAMA's depredations have lapsed, the United States should be estopped from claiming title to the ALABAMA by virtue of succession.

2. a. The court of appeals' second constitutional misstep is of much greater significance.[4] The Third Circuit has enunciated the proposition that *if* the United States had acquired title to the ALABAMA in either 1864 or 1865, the Property Clause of article IV would bar any possibility of abandonment to a subsequent finder in admiralty, save by affirmative act of Congress. *United States* v. *Steinmetz*, 973 F.2d at 222-23, Pet. App. 24-27; 763 F. Supp. at 1298-99, Pet. App. 42-46.

Petitioner believes this puts the Property Clause on its head. After all, that provision notes that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Until such time as Congress had acted, a public vessel of the United States may have been deemed to have been abandoned, and a finder's title held to be good as against the United States.

The Third Circuit has, with one stroke, overruled the venerable admiralty law of finds, at least for property owned

[4] Petitioner understands that the Repudiation Clause of the Fourteenth Amendment would only be a bar to the United States succeeding to Confederate property in a handful of cases.

by the United States. The law of finds gives title to a person who has reduced to possession an object which has been abandoned at sea. Courts in this country have given consistent recognition to the doctrine, and have given title to a finder in admiralty when warranted by the facts.[5] The court of appeals' decision works a substantial, and unwarranted, change in the disposition of government property at sea.

b. What is particularly surprising is the scant authority relied upon by the lower court in making this sweeping alteration of the admiralty law. Both the district court and Third Circuit relied solely on a decision called *Hatteras, Inc.* v. *The U.S.S. HATTERAS*, 1984 A.M.C. 1094 (S.D. Tex. 1981), *aff'd mem.*, 678 F.2d 1215 (5th Cir. 1982). *See United States* v. *Steinmetz*, 973 F.2d at 223, Pet. App. 24-27; 763 F. Supp. at 1298-99, Pet. App. 42-44.

In that case, the District Court for the Southern District of Texas ruled the United States had not abandoned title to the wreck of the USS HATTERAS, which, ironically enough, had been sunk by the subject of this case, the CSS ALABAMA, in January 1863. 1984 A.M.C. at 1095. Relying on this Court's decision in *United States* v. *California*, 332 U.S. 19 (1947), the *HATTERAS* court decided

[5] *See, e.g., Martha's Vineyard Scuba Headquarters, Inc.* v. *The Unidentified, Wrecked, and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Klein* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978); *Indian River Recovery Co.* v. *The CHINA*, 645 F. Supp. 141 (D. Del. 1986); *Chance* v. *Certain Artifacts Found & Salvaged from the NASHVILLE*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985); *Rickard* v. *Pringle*, 293 F. Supp. 981 (E.D.N.Y. 1968).

the United States could not, under the Property Clause of the Constitution, abandon public property via the admiralty law of finds. 1984 A.M.C. at 1098 (quoting this Court as saying "officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." (332 U.S. at 40)).

The HATTERAS decision manifestly took too much license from *United States* v. *California*. At no time has this Court as much as hinted that the Property Clause should be interpreted as having overruled the admiralty's traditional law of finds. Instead, where Congress has chosen not to prescribe a method of abandoning federal property at sea, the law of finds prevails.

c. If a proper construction of the Property Clause is followed here, Petitioner should prevail in showing that the United States had abandoned any title to the bell of the CSS ALABAMA. As of 1936, the year in which the bell was found, there was no Act of Congress which prescribed an alternative, administrative method for abandoning public vessels wrecked at sea.

The issue would then become whether customary international law and maritime law principles, prevailing in 1936, would have allowed Mr. Lawson, the finder, to acquire good title. Petitioner has consistently maintained that they would. The United States has (as recently as 1980) admitted that until quite recently it was generally acknowledged that nations could be divested of title to their sunken warships under the admiralty law of finds. *See* 1980 *Digest of United States Practice in International Law* 999, 1003-05 (M.N. Leich ed.) (Opinion of State Dep't Legal Advisor, Dec. 30, 1980) (collecting authorities). Prior to the 1960s, the decisions of courts in this country clearly evinced the position

that a State could abandon title in its sunken warships.[6]

d. The proper constitutional presumption of the abandonment of government property at sea is implicated in a large number of cases. It is an issue whenever an individual discovers the remains of a public vessel of the United States. There will be many more such discoveries as diving enthusiasm increases and underwater recovery technology advances. The impact of the Third Circuit's decision is to foreclose *any* possibility of claiming the United States had abandoned its property under the admiralty law of finds. Yet, it is incumbent upon Congress to prescribe rules that would preempt the admiralty law, as it has occasionally purported to do.[7] If the Third Circuit's decision is left unreviewed, the Property Clause of the Constitution will have been presumed to have jettisoned the law of finds, a result which is as much unnecessary as it is inconsistent with the goal of uniformity in admiralty actions.

3. This Petition invites the Court to grapple with unsettled issues of the abandonment of government property

[6] *See, e.g., Baltimore, Crisfield & Onancock Line, Inc.* v. *United States*, 140 F.2d 230, 234 (4th Cir. 1944) (U.S. battleship sunk as target practice in 1911); *State ex rel. Bruton* v. *Flying "W" Enters., Inc.*, 160 S.E.2d 482 (N.C. 1968) (Confederate blockade runners and other vessels); *State by Ervin* v. *Massachusetts Co.*, 95 So. 2d 902, 903 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957) (U.S. battleship sunk as target practice in 1922, found in 1952); *Deklyn* v. *Davis*, 1 Hopk. Ch. 154 (N.Y. 1824) (British frigate sunk in 1781 or 1782, found 30 years later).

[7] *See* Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2106(a) ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which . . . this Act applies."). Because the Abandoned Shipwreck Act applies only to vessels embedded on the seabed in state waters, 43 U.S.C. § 2105, it is not otherwise implicated here.

at sea. The first issue to be addressed is, *assuming* the United States had good title to the wreck of the ALABAMA in either 1864 or 1865, whether the Property Clause of article IV should be construed to allow a claim of abandonment under the law of finds. If the Court agrees with Petitioner on this first point, and the corollary proposition that the United States had in fact abandoned the ALABAMA as of 1936, then title would thus vest in Mr. Steinmetz as a holder in due course, having bought good title from the bell's finder, William Lawson.

Should this Court reject Petitioner's argument under the Property Clause, it would remain to review the holding that the United States acquired title to the wreck of the CSS ALABAMA by succession. This turns on whether the United States was barred by the Repudiation Clause from succeeeding to title to the ALABAMA. Fairly included in this issue is whether the ALABAMA was considered property, muchless public property, to which the doctrine of succession was even applicable.

If this Court agrees with Petitioner on this second point, the Court could exercise its prudential discretion and review the question whether the USS KEARSARGE captured the CSS ALABAMA under the law of naval prize. Alternatively, the Court could reverse and remand the case to the court of appeals for a determination whether the United States "constructively" captured the ALABAMA, the issue left undecided below.

CONCLUSION

For the foregoing reasons, this Petition should be GRANTED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5582

UNITED STATES OF AMERICA

v.

RICHARD STEINMETZ,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 90-05036)

Argued April 7, 1992

Before: SLOVITER, *Chief Judge*, SCIRICA and
NYGAARD, *Circuit Judges*

(Filed August 21, 1992)

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OPINION OF THE COURT

SLOVITER, *Chief Judge*.

The circumstances out of which this appeal arises are more suited to an epic poem than a legal opinion. They include a marauding vessel of the Confederacy, a Union man-of-war secretly outfitted with iron chain mail covering its hull concealed by planking, a maritime duel challenged and accepted, combat between the vessels in international waters off the coasts of England and France, the white flag of surrender, the sinking of the Confederate ship to its watery grave, the escape of its captain, the recovery of its bell by a British diver 72 years later, and the bell's odyssey[1] spanning from a local pub, through World War II bombing and a succession of antique dealers, to its temporary docking on the floor of a federal courtroom in New Jersey, and its current display at the Naval Historical Center at the Washington D.C. Navy Yard.

We will never know all of the historical facts of the naval battle. The eyewitnesses are no longer

1. In contrast, Odysseus spent merely ten years fighting the Trojans and ten years fighting assorted other dangers and temptations until his return to Ithaca. *See The Odyssey of Homer* (Richmond Lattimore trans. 1967).

alive, and we are left with the possibility that their written accounts are skewed by unspent passions. However tempting the incursion into the detours of unanswered historical questions, we are convened for another purpose. The legal issue presented is whether the bell from the C.S.S. ALABAMA, a Confederate commerce raider sunk by the Union Navy off the coast of Cherbourg, France in 1864, is the property of the United States, either by right of succession or by right of capture. Appellant Richard Steinmetz bought the bell in England in 1979 and brought it back to the United States. When he put it up for auction in 1990, the United States Navy claimed that the bell was its property. The district court agreed with the Navy and Steinmetz appeals.

I.

Facts[2]

In 1861, Captain James D. Bulloch, an agent of the Confederate Navy, went to Liverpool, England to contract for warships. His task was complicated by Britain's neutrality, proclaimed by Queen Victoria in May 1861, and its Foreign Enlistment Act of 1819, which forbade the construction and arming of warships in British territory for a belligerent power. The British circumvented these

2. The nature of this dispute requires us to consult historical documents included in the parties' appendices and admitted into evidence pursuant to Fed. R. Evid. 803(16) (hearsay exception for statements in ancient documents), historical texts cited by the parties in their briefs or relied on by the district court, and a standard reference work, 2 Alexander H. Stephens, *A Constitutional View of the Late War between the States* (1870), because it contains direct quotations from original sources and provides a contemporaneous view.

requirements by allowing private parties to build ships but not arm them. For example, despite the efforts of Thomas S. Dudley, the United States Consul in Liverpool, the Confederate cruiser FLORIDA departed from Liverpool in March of 1862 only to be armed later with weapons shipped out separately.

In July 1862, the steamship ALABAMA, despite similar attempts to detain her, also departed from Liverpool and proceeded to the Azores, where she picked up guns and ammunition. In August 1862, she was put into commission as a Confederate cruiser by Captain Raphael Semmes, a native of the state of Alabama and a former officer in the United States Navy who had resigned to join the Confederate Navy soon after Alabama seceded from the Union. Semmes and the ALABAMA roamed the Atlantic Ocean, the Gulf Coast, the African Cape, and the China Sea for two years destroying or capturing at least 62 American merchant and whaling ships. According to one source, the work of the Confederate cruisers and privateers, in addition to their effect on individual ships, raised insurance rates, caused hundreds of American vessels to fly under the British flag to avoid capture, and generally "gave the American merchant marine a setback from which it did not recover till the time of the first World War." J.G. Randall & David Donald, *The Civil War and Reconstruction* 451 (2d ed. 1969).

In June, 1864, while the ALABAMA was docked in Cherbourg, France for repairs, Captain Semmes learned that the U.S.S. KEARSARGE, a Union ship under the command of Captain John Winslow,[3]

3. Coincidentally, Semmes and Winslow were cabinmates

was positioned in international waters outside the harbor of Cherbourg. On June 19, 1864, the ALABAMA went to sea to meet the KEARSARGE, accompanied by the DEERHOUND, an English yacht out on a leisure cruise, and under the gaze of crowds of people who came from as far as Paris and lined the harbor to watch the battle. After a little over an hour, the ALABAMA, having been badly hit and sinking fast, struck its colors and ran up a white flag. Semmes sent an officer in a boat to the KEARSARGE to request assistance saving the men from their sinking ship. After boats of wounded were sent to the KEARSARGE, Captain Semmes and the rest of the surviving crew jumped overboard just before the ALABAMA sank. Some of the crew were picked up by the KEARSARGE and taken as prisoners, but many crewmen died. Captain Semmes along with the remainder of his officers and crew were picked up by the DEERHOUND and taken to England, where they were set free.

The exploits of the ALABAMA and other Confederate raiders were the subject of an international dispute between the United States and England which became known as the "Alabama Claims."[4] After the war, the United States sought indemnity from England for the havoc wreaked upon its interests by the Confederate warships that were built, outfitted, and generally assisted by the English. These

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when they served together in the United States Navy during the war with Mexico.

4. The battle has also been celebrated in the fine arts. Édouard Manet's famous painting of the battle is in the permanent collection of the Philadelphia Museum of Art.

claims were settled by an international arbitration tribunal, convened pursuant to the Treaty of Washington of 1871, that met in Geneva and awarded $15.5 million to be paid by Great Britain to the United States. *See* Randall & Donald, *The Civil War and Reconstruction* 671-77.

In 1936, William Lawson, a British diver from the Isle of Guernsey, retrieved the brass bell from the ALABAMA, inscribed with the letters "C.S.S. Alabama,"[5] and sold it to a local bar, apparently for drinking privileges. App. at 88. That bar was destroyed by British bombing during World War II, Guernsey having fallen into German hands. The bell was dug out of the rubble after the war and exchanged hands until it wound up with an antique dealer in Hastings, England. In 1979, appellant Steinmetz, a New Jersey resident and an antique dealer for 40 years, heard about the bell while at an antique gun show in London. Steinmetz flew to Guernsey, spent a week and a half researching its authenticity, and then purchased the bell by trading approximately $12,000 worth of antique guns and pistols.

Steinmetz took the bell back to his home in Westwood, New Jersey. Within a week after his arrival back in the United States, he offered to sell or trade the bell to the United States Naval Academy. The Academy apparently wanted to display the bell but would not purchase it, so Steinmetz put it on his shelf for 11 years.

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5. Steinmetz suggested that this inscription was hand cut rather than cast because there were Union agents in the bell foundries in England, on the lookout for equipment being built for the Confederacy. App. at 91.

In December 1990, Steinmetz put the bell up for auction with the Harmer Rooke Galleries in New York. After the Naval Historical Center learned of the auction, the United States claimed that the bell was its property, and filed a complaint in admiralty in the United States District Court in New Jersey and a motion to show cause why Steinmetz should not deliver the bell to the United States. In response, Steinmetz delivered the bell to the district court, and filed an answer and counterclaim for a determination that the bell was his property, for payment of full market value for the bell or, in the alternative, compensation under the theories of *quantum meruit* and/or unjust enrichment on the part of the United States. After a hearing[6] in the district court on the motion to

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6. There was yet an additional unexpected twist to the saga of the bell. Coincidentally, one of the district judges of New Jersey, John Winslow Bissell, is a descendant of the KEARSARGE's Captain Winslow. On the date fixed for the hearing on the order to show cause, there was a ceremony attended by school children at which Judge Bissell participated and recounted the history of the bell, reading primarily from the account of the ALABAMA's executive officer, Lieutenant Kell. Steinmetz contends that Judge Bissell's "testimony" may have unfairly influenced the district court into ruling that the ALABAMA had been captured by the KEARSARGE.

It is unlikely that the parties present deemed Judge Bissell's presentation to have been "testimony." He did not appear to have been sworn in and he apparently left after his presentation. App. at 42. Had he in fact testified it might have raised questions of the appearance of impropriety. It is evident that the district court did not regard the ceremony, designed to excite the interest of 6th graders in one phase of American history, as part of the case record because the court stated, after thanking its colleague Judge Bissell, "[w]e will now proceed with the more formal part of the case. We'll start with the evidence which the government may wish to put on the

show cause, both parties moved for summary judgment.

The district court granted the United States' motion for summary judgment, finding in the government's favor on both theories put forth by it. *United States v. Steinmetz*, 763 F. Supp. 1293 (D.N.J. 1991). The court found that the ALABAMA had been captured by the KEARSARGE and therefore became United States property at the time of the battle in 1864. *Id.* at 1298. In the alternative, the court found that because the United States succeeded to the public property of the Confederacy after the Civil War, the ALABAMA became the property of the United States when the war was over. *Id.*

The court also found that by virtue of Article IV, Section 3, Clause 2 of the United States Constitution and statutory law, the United States did not abandon the ship because no congressionally authorized person formally abandoned the wreck of the ALABAMA. *Id.* at 1299. Finally the district court found that it lacked jurisdiction to hear Steinmetz's counterclaims seeking compensation for the bell on the theories of *quantum meruit* and unjust enrichment because the United States had not affirmatively waived its immunity to such claims. *Id.* at 1300. Steinmetz does not appeal the counterclaim issue, since he does not assert it in his brief. *See* Fed. R. App. P. 28(a).[7]

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record." App. at 42. In any event, we do not reach the issue of capture in our disposition of this case, and thus any possible influence arising out of Judge Bissell's participation must necessarily be harmless.

7. This court's request that the parties brief the question

Although the district court granted summary judgment, a procedure that does not contemplate oral testimony, the court based its judgment in part on the earlier testimony of Naval Historian William S. Dudley and Steinmetz given in connection with the Court's order to Steinmetz to show cause why he should not deliver the bell to the United States.

We have in the past, when faced with a similar situation, determined that if there was no additional evidence presented to the trial court that would aid the adjudication of the case, we would review the court's findings of fact under a "clearly erroneous" standard. *See Donovan v. DialAmerica Mktg.*, 757 F.2d 1376, 1382 (3d Cir.), *cert. denied*, 474 U.S. 919 (1985). This would be awkward here because there were some disputed issues of fact presented to the district court, particularly concerning the capture issue, which the district court resolved after taking testimony. Because we do not decide the capture issue, those disputed facts are essentially irrelevant and we rely for our disposition only on the undisputed facts upon which the court based its summary judgment. It is the legal conclusions reached by the trial court that are at issue and they are subject to plenary review.

II.

Discussion

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whether Steinmetz should have asserted his claim for *quantum meruit* and/or unjust enrichment in the Claims Court does not relieve Steinmetz from the effect of his failure to preserve the issue. Winston v. Children & Youth Serv., 948 F.2d 1380, 1385 (3d Cir. 1991).

The legal issues raised by this case appear to be of substantial interest to numerous persons beyond the United States and Steinmetz. Thus, we have received a brief from *Amici Curiae* American Sport Divers Association, Federation of Metal Detector & Archeological Clubs, Alliance for Maritime Heritage Conservation, International Scuba Association, Eastern Dive Boat Association, and North-South Trader Civil War Magazine, who represent "thousands of individuals who, either as a hobby or as a business, have a financial interest in Confederate military equipment, and other historically significant military artifacts," and who argue that their potential loss of ownership rights to these artifacts to the government under the theory of succession "would have a significant 'chilling effect' on their efforts to expand our knowledge of Civil War history through discovery and preservation of its physical relics."

Arrayed against them are *Amici Curiae* National Trust for Historic Preservation in the United States, Society of Professional Archeologists, Society for Historical Archaeology, Advisory Council on Underwater Archaeology, Society for American Archaeology and Council of American Maritime Museums. These *amici* argue that "[r]ecognition of United States ownership of Confederate property . . . . will ensure that the United States maintains the right and ability to protect and preserve historic artifacts and archaeological artifacts . . . which would otherwise be subject to damage or loss through inappropriate retrieval and disposition," and will remove the economic incentives for individuals to remove artifacts from their historical contexts for personal financial gain. We cannot base a ruling on either

of these grounds which are more appropriately directed to Congress than to a court. Instead, we must attempt to steer our course on the basis of legal doctrine applied to the known historic facts.

A.

Capture

In support of his argument that the district court erred in holding that the government is entitled to the ALABAMA's bell by virtue of capture, Steinmetz argues that the prerequisites for establishing that the KEARSARGE captured the ALABAMA were not satisfied. It is uncontroverted that the ALABAMA, despite its having struck its colors and raised the white flag of surrender, never came within the physical possession of the KEARSARGE. Indeed, Semmes wrote that cannons were fired from the KEARSARGE even after the ALABAMA's intention to surrender was communicated. *See* Admiral Raphael Semmes, CSN, *Memoirs of Service Afloat During the War Between the States* 757 (The Blue & Grey Press 1987). In any event, the ship sank before the KEARSARGE could exercise any control over it.

The district court, apparently in recognition of the absence of a factual basis to support the traditional view of capture, stated that before the ALABAMA sank, the KEARSARGE was "positioned across ALABAMA's bow thwarting escape and able to deliver unanswerable raking fire," thereby establishing it was in the "constructive possession" of the ALABAMA.[8] *Steinmetz*, 763 F. Supp. at

8. Captain Semmes maintained that the KEARSARGE never came within 400 yards of the ALABAMA. Semmes, *Memoirs* 759.

1298. Steinmetz argues that such a doctrine has never been accepted in law. The government responds by citing to an allusion to constructive possession in the early decision of *The Alexander*, 1 F. Cas. 357, 360 (C.C.D. Mass. 1813)(No. 164), *aff'd*, 12 U.S. (8 Cranch) 169 (1814). No case has been cited that based a decision on constructive possession without there having been some actual control over the "captured" ship's movements by the captor. However, we need not decide the viability of a constructive capture doctrine on this appeal, because we conclude that there is ample basis to support the judgment of the district court on its alternative theory of succession. This permits us to avoid the conundrum presented by the differing accounts of the battle from long since unavailable eyewitnesses.

B.

Succession

In his argument that the district court erred in holding that the United States succeeded to the ownership of the ALABAMA as the successor to the property of the Confederacy, Steinmetz offers two theories. First he argues that inasmuch as the law of succession only applies to public property, the United States could not succeed to the ownership of the ALABAMA because it was not owned by the Confederacy but was privately owned as a pirate ship. Alternatively, Steinmetz contends that even if the ALABAMA was the property of the Confederacy, the United States never adopted the succession doctrine as it was understood in international law and, to the extent that it did, it

would have been required to perfect its title to the ALABAMA long ago.

1. *Pirate Ship*

Steinmetz concedes that the *de facto* government of the Confederacy could acquire title to real and personal property, a principle established in Supreme Court cases. *See, e.g., Whitfield v. United States*, 92 U.S. 165, 166 (1876) ("[w]e have thus decided that the Confederate States Government could acquire title to real property by purchase; and it is not easy to see why a different rule should be applied to personal property"). Steinmetz's argument that the ALABAMA was not public property is really based on a form of estoppel: during the war, Union officials described the ALABAMA and its crew as "pirates" and therefore the United States cannot now claim that the Alabama was publicly owned.

Historical materials do show that the Confederate privateers and commerce raiders were referred to as "pirates." In announcing the Union blockade of the South on April 19, 1861, President Lincoln threatened to punish under the laws relating to piracy those acting under the "pretended authority" of the Confederacy who "molest a vessel of the United States." 12 Stat. 1258, 1259 (1861). The Secretary of the Navy, Gideon Welles, in a dispatch to Captain Winslow after the sinking of the ALABAMA, made reference to the prisoners taken by Winslow as "foreign pirates." App. at 152.

There were even trials of Confederate privateers for piracy. For example, in 1861, members of the Confederate schooner SAVANNAH went on trial for piracy in federal court in New York, but the trial

ended in a hung jury and the defendants were eventually exchanged as prisoners of war. *See* John D. Gordan, III, The Trial of the Officers and Crew of the Schooner "Savannah", 1983 Yearbook-Supreme Court Historical Society 31; Trial of the Officers and Crew of the Schooner Savannah, on the Charge of Piracy, United States Circuit Court for the Southern District of New York, October 23, 1861 (trial transcript). This incident gave rise to a letter, dated Richmond, July 6, 1861, written to President Lincoln from Jefferson Davis, threatening that,

> "this Government will deal out to the prisoners held by it, the same treatment and the same fate as shall be experienced by those captured on the Savannah; and if driven to the terrible necessity of retaliation, by your execution of any of the officers or crew of the Savannah, that retaliation will be extended so far as shall be requisite to secure the abandonment of a practice unknown to the warfare of civilized man, and so barbarous, as to disgrace the nation which shall be guilty of inaugurating it."

2 Alexander H. Stephens, *A Constitutional View of the Late War Between the States* 432-33 (1870) [hereinafter Stephens, *A Constitutional View*] (quoting letter of Jefferson Davis).

Nevertheless, all of the historical evidence suggests that the references to piracy were more rhetorical than legal. The Confederacy was recognized by the United States as possessing "belligerent rights", *Williams v. Bruffy*, 96 U.S. 176, 186-87 (1878) (captives treated as prisoners of war, exchange of prisoners, recognition of flags of truce, and "other arrangements having a

tendency to mitigate the evils of the contest"); 1 John Bassett Moore, *A Digest of International Law* 184-86 (1906) [hereinafter Moore, *International Law*] (noting recognition of belligerency by England, France, Spain, the Netherlands, and Brazil). There is every indication that the ALABAMA sailed under the Confederate flag. *See United States v. Smith*, 27 F. Cas. 1134, 1135 (C.C.E.D. Pa. 1861) (No. 16,318) (defining piracy as, "'depredation on or near the sea without authority from any prince or state'").

Death was the recognized penalty for piracy yet no Confederate was ever executed for the crime. Those suspected and/or convicted of piracy during the war were either released or treated as prisoners of war. *See* J.G. Randall, *Constitutional Problems Under Lincoln* 66 (University of Illinois Press 1951) [hereinafter Randall, *Constitutional Problems*]; 2 Moore, *International Law* 1079 (noting *Smith*, 27 F. Cas. 1134, in which convicted prisoners were delivered to military custody); 2 Stephens, *A Constitutional View* 434 ("Whether the authorities at Washington were induced to change their policy and purpose in this particular, by a recognition of the laws of war, or from a sense of humanity, or from fears excited in another quarter, will, perhaps, be left forever to conjecture; for no explanation of it has ever been given to the public, as far as I am aware.").

In fact, there appears to have been a conscious decision not to prosecute Captain Semmes for piracy after the war. In August, 1872, Bolles, the Solicitor of the Navy Department, discussed this issue in the *Atlantic Monthly*, stating:

> "By establishing a blockade of Confederate ports, our Government had recognized the Confederates as belligerents, if not as a belligerent state, and had thus confessed that Confederate officers and men, military or naval, could not be treated as pirates or guerrillas, so long as they obeyed the laws of war."

2 Moore, *International Law* 1082-83 (quoting *Atlantic Monthly* for July & August 1872).

The discrepancy between what the Union said and what it did with regard to the piracy issue has been summarized by one historian as follows:

> [F]rom every standpoint it was found impolitic and indeed impossible to carry out this policy of punishing for piracy those who were in the Confederate service. It is thoroughly recognized in international law that those who operate at sea under the authority of an organized responsible government observing the rules of war may not be treated as pirates. Internationally, the Confederacy was a recognized belligerent, and to have its ships deemed piratical under the *jus gentium* was entirely out of the question. To treat them as pirates under the municipal law was practically equivalent to treating them as traitors . . . . Besides, when it became known that Southern privateersmen were being held for piracy, retaliation was at once threatened, and certain Union captives were selected as hostages, on whom the Richmond Government intended to retaliate in case the Federals should actually prosecute the piracy charge.

Randall, *Constitutional Problems* 65-66 (footnote omitted).

There was ample evidence in the record that the ALABAMA was owned by the Confederacy. All accounts of the ALABAMA presented to the district court stated that the ALABAMA was built in Liverpool under contract with the Confederacy. *See Steinmetz*, 763 F. Supp. at 1294; App. at 89 (Steinmetz's testimony). There was no evidence presented that the Confederacy transferred ownership of the ALABAMA to its crew, or that Captain Semmes or a member of his crew paid for the ALABAMA or captured it from the Confederacy.

Without some facts to contradict the clear evidence that the Confederacy owned the ALABAMA and that Captain Semmes, although obviously given considerable autonomy on the high seas, was understood by the United States and the Confederate government to be an agent of the Confederacy, there is no material question of fact as to whether the Confederacy owned the ALABAMA when it sank in 1864. Thus, we conclude that the ALABAMA was not a piratical vessel.

2. *Property of the Confederacy*

Having established that the Confederacy owned the ALABAMA, we are faced with the question whether the United States succeeded to its ownership after the Civil War.

State succession is not a well-defined legal doctrine. One commentator, noting the different treatment given to the law of state succession by different writers, has suggested that it be treated in "specialized contexts" because the "concepts of 'succession' and 'continuity' of states . . . are

levels of abstraction unfitted to deal with specific issues." *See* Ian Brownlie, *Principles of Public International Law* 635 (1966).

Amici Curiae American Sport Divers Association, *et al.* contend that succession can only occur between sovereign governments, and that the recognition of the Confederacy as a belligerent did not amount to recognition of it as a sovereign. They cite the following:

> The transfer of territory from one State to another takes place in at least five ways, namely, (a) cession, (b) annexation, (c) emancipation, (d) formation of a union, and (e) federation. The common factor in all five situations is that one sovereign substitutes itself for another.

1 D.P. O'Connell, *International Law* 365 (2d ed. 1970) (footnote omitted).

This definition of succession is not exclusive, however. O'Connell makes a distinction between succession of states and succession of governments. *See id.* at 394 ("the property acquired by rival political organisations is attributed to the State to whose government they pretend, so that the assets of the defeated may be claimed by the victor but subject to the liabilities of the defeated respecting it" (footnote omitted)); *see also* Charles G. Fenwick, *International Law* 172 (4th ed. 1965).

The Supreme Court has stated both that after the Civil War the public property of the Confederacy passed to the United States and that the United States did not have to physically possess the property in order to have succeeded to its ownership. In *Williams v. Bruffy*, the Court stated:

> [The Confederacy] claimed to represent an independent nation and to possess sovereign powers; and as such to displace the jurisdiction and authority of the United States from nearly half of their territory and, instead of their laws, to substitute and enforce those of its own enactment. Its pretensions being resisted, they were submitted to the arbitrament of war. In that contest the Confederacy failed; and in its failure its pretensions were dissipated, its armies scattered, and the whole fabric of its government broken in pieces. *The very property it had amassed passed to the nation.* The United States, during the whole contest, never for one moment renounced their claim to supreme jurisdiction over the whole country . . . .

96 U.S. at 188 (emphasis added).

In *United States v. Huckabee*, 83 U.S. (16 Wall.) 414 (1873), the Court found it had no jurisdiction to entertain a claim by Huckabee who had sold his iron works company to the Confederacy. The property was captured by Union forces in 1865 and then sold to Lyon soon thereafter. The Court found it lacked jurisdiction for a number of reasons, one of which was that Lyon's title was valid because it was acquired from the United States which had captured the iron works. The Court then elaborated on this point, stating that "as the confederation having been utterly destroyed no treaty of peace was or could be made," and that "if the nation is entirely subdued, or in case it be destroyed and ceases to exist . . . [the rights of the conqueror] are no longer limited to mere occupation of what he has taken into his actual possession, but *they extend to all the property and*

rights of the conquered state, including even debts as well as personal and real property." *Id.* at 434-45 (emphasis added).

In *Leathers v. Salvor Wrecking Co.*, 15 F. Cas. 116 (C.C.S.D. Miss. 1875) (No. 8,164), the United States had contracted with a salvage company to salvage the steamer Natchez, a private boat used by the Confederate government which was burnt and sunk during the war. The court determined that since the Confederacy had fully compensated the owner for the boat, the United States became its rightful owner after the war:

> If the steamer Natchez was impressed into the service of the Confederate States government, and was burnt and sunk whilst in that service, and if full compensation for the vessel's loss was paid to the libelant by that government, the property of the wreck thereafter belonged to it; and at the close of the war, became the property of the government of the United States, which thereupon acquired a right to dispose of the wreck as it saw fit.

Id.

The English courts took a similar view. Thus, for example, in *United States v. McRae*, 8 L.R.-Eq. 69 (Court of Chancery 1869), the United States claimed ownership to goods and money held by McRae, an agent of the Confederacy who had been an intermediary in England for the sale of Confederate goods. McRae claimed that he was owed money by the Confederacy but the United States refused to agree to settle with McRae upon receiving the goods. The court held that without such an agreement, the United States could not

succeed to the Confederate property in McRae's possession. The court stated:

> [T]his right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it.

See also United States v. Prioleau, 35 L.J. Chancery N.S. 7, 11 (1865) (cotton owned by the Confederacy with a lien held by members of an English firm is property of the United States, subject to all the conditions and liabilities to which the property is subject).

Steinmetz and the *Amici* contend that the succession doctrine is inapplicable to the Confederacy's property because under that doctrine the successor government taking the assets of the conquered government must also take on its debts, which the United States did not do with respect to the Confederacy. Indeed, section 4 of the Fourteenth Amendment explicitly provides:

> [N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, . . . but all such debts, obligations and claims shall be held illegal and void.

U.S. Const. amend. XIV, § 4.

As Steinmetz notes, the English courts that addressed this issue assumed that when the

United States succeeded to the property of the Confederacy, it also succeeded to the debts and obligations attached to that property. Thus, those courts would not allow the United States to succeed to Confederate property without assuming the outstanding obligations as to that property. *See McRae*, 8 L.R.-Eq. at 69; *Prioleau*, 35 L.J. Chancery N.S. at 11. We are unable to find a United States case that so held. But even the English courts did not interpret the succession doctrine to require the United States to succeed to the Confederacy's debts unrelated to the particular property at issue.

Even though there may be some question as to the exact contours of the succession doctrine as applied by the United States after the Civil War, in the case of the ALABAMA there were no outstanding liabilities for which the United States might have been responsible had it asserted its title to the ALABAMA right after the war. Steinmetz does not allege that the ALABAMA was not fully paid for by the Confederacy.

It follows that whether or not historians would regard the international law of succession as applicable here,[9] the succession doctrine, as

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9. Randall makes the argument that it is inappropriate to consider the United States' actions after the war as acts of a successor *per se*:

> [T]o argue that the United States should have taken over the Confederate debt would be to assume that the Confederate States had existed before the war as an established international person, and had then been conquered and absorbed by the United States. Even then, prevailing international practice would have suggested that Confederate debts incurred for the war itself should not be assumed. . . . The defeat of such a rival government did not amount to the overthrow

explicated and applied by the United States Supreme Court with respect to the Civil War, entitled the United States to all property acquired by the Confederacy. Therefore, we hold that, as a matter of law, the United States acquired title to the ALABAMA after the Civil War ended.

3. *Abandonment*

Steinmetz offers one final argument to defeat the United States' claim that it owns the ALABAMA's bell. He claims that even if the United States did succeed to ownership of the ALABAMA after the war, the United States abandoned the ship in the depths of the briny sea because it never asserted ownership of it and never showed any interest in its salvage.[10]

Article IV, Section 3, Clause 2 of the Constitution states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

> or absorption of an existing 'state' in the international sense. As to the principle of state-continuity, it was preserved in the fact that the United States was not supplanted in its control over the South.

Randall, *Constitutional Problems* 238 n.51.

10. Abandonment is defined as the "surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all rights, title, claim and possession, with the intention of not reclaiming it." Black's Law Dictionary 2 (5th ed. 1979).

This clause has been interpreted to mean that the United States cannot abandon its own property except by explicit acts. As the Court stated in *United States v. California*, 332 U.S. 19 (1947):

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

Id. at 40. *See generally* 91 C.J.S. *United States* §§ 75-76 (1955).

Steinmetz correctly points out that the policy of the United States concerning abandonment of its sunken vessels has not always been consistent. In recent times, a Deputy Legal Advisor of the Department of State has recognized the practice of treating warships from the 17th and 18th centuries as abandoned by implication of the long passage of time, but has taken the position that with respect to U.S. warships of the 19th and 20th centuries, that "'it should be presumed that title to such vessels remains in the U.S.'" Marian Nash Leich, Digest of United States Practice in International Law 1004 (1980) (quoting Legal Adviser's Memorandum). The same document concluded that "[a]lthough abandonment may be implied under some circumstances, United States warships that were sunk during military hostilities are presumed not to be abandoned and are considered not subject to salvage in the absence

of express consent from the United States Government." *Id.* at 1005.[11] It is clear that vessels sunk during the Civil War are covered by the policy asserting United States title to them.

In *Hatteras, Inc. v. The USS Hatteras*, 1984 A.M.C. 1094 (S.D. Tex.), *vacated in part on other grounds*, 1984 A.M.C. 1102 (S.D. Tex. 1981), the court held that the U.S.S. HATTERAS, which was sunk by the ALABAMA in 1863 in international waters south of Galveston, Texas, remained the property of the United States despite over one hundred years of neglect. The court distinguished abandoned public property from private property, noting that although an inference of abandonment can sometimes be made from non-use of private property, property of the United States can only be abandoned as authorized by Congress. *Id.* at 1098; *cf. United States v. Pennsylvania & Lake Erie Dock Co.*, 272 F. 839, 843 (6th Cir. 1921) (distinguishing abandonment by the United States of temporary easement, which is possible without an Act of Congress, from abandonment of property whose title the government has acquired, which is not).[12]

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11. This policy stems not only from concern about preservation of American history but from sensitivity to the fact that wrecks of warships "are the watery graves of American war dead." Brief for Appellee at 7.

12. As to the legal status of the ALABAMA between its sinking and the Union's victory, some question could be raised as to whether the Confederacy abandoned the ALABAMA after it sank and before the end of the war. However, in the Constitution of the Confederate States of America, adopted unanimously by the Confederate Congress on March 11, 1861, and modelled on the United States Constitution, there was a clause analogous to Article IV, Section 3, Clause 2 of the

We find unpersuasive Steinmetz's attempt to distinguish *Hatteras* on the ground that that ship was in international waters whereas the ALABAMA, which was originally in international waters, is now in French waters because France extended its territorial seas in 1971. The bell was taken from the wreck before France extended its territory. *See* J. Ashley Roach, France Concedes United States Has Title to the CSS ALABAMA, 85 Am. J. Int'l L. 381, 382 n.2 (April 1991). Thus, there is no basis for Steinmetz's abandonment theory.[13]

III.

Conclusion

We conclude that as a matter of law the ALABAMA's bell is the property of the United States by right of succession and that the district court was correct in so holding. It is not lost on us that this leaves uncompensated Steinmetz's

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United States Constitution. It stated:

> The Congress shall have power to dispose of and make all needful rules and regulations concerning the property of the Confederate States, including the lands thereof.

Confederate States of America Const., art. IV, § 3, cl. 2. Had the Confederacy won the Civil War, this clause presumably would have preserved its property interest in the ALABAMA and prevented the ship from becoming abandoned property. Thus, the Confederacy retained its property interest in the ALABAMA between the time it sank on June 19, 1864 and the time the war ended, on April 9, 1865 (Appomatox) or April 2, 1866. *See* Freeborn v. The Ship Protector, 79 U.S. (12 Wall.) 700, 702 (1872).

13. Because the United States did not officially abandon the ALABAMA, we need not address the contention that the ALABAMA and its bell are subject to the law of finds.

considerable energy and creativity in retrieving and returning to the United States an irreplaceable artifact from its history. The district court noted that "[o]ne would think . . . that in the unusual circumstances of this case some way could have been devised to make Mr. Steinmetz whole. But that, apparently was more than the bureaucratic mind could accomplish." *Steinmetz*, 763 F. Supp. at 1300 n.2. It may be that the United States' position to deny compensation even to those whose title traces from the original diver rather than their own expedition is in line with its policy "to discourage disturbing these wrecks except for professional, non-invasive archeological research." Brief for Appellee at 7.[14]

Steinmetz, of course, is free to present his case to a sympathetic congressional representative who may introduce a private bill. As we noted at the outset, our function is to decide the law, and thus decide for whom the ALABAMA's bell tolls after 128 years: it tolls for the United States.

For the foregoing reasons we will affirm the judgment of the district court.

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14. The Navy could compensate Steinmetz pursuant to 10 U.S.C.A. § 2572(b) (West Supp. 1992), which allows the Secretary of the Navy to trade items held by the Navy for similar items held by an individual "which directly benefit the historical collection of the armed forces." Steinmetz's counsel has indicated that Steinmetz might agree to such a trade.

A True Copy:
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Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

UNITED STATES OF AMERICA, Plaintiff, v.
RICHARD STEINMETZ, Defendant

Civil Action No. 90-5036

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

763 F. Supp. 1293; 1991 AMC 2099

May 13, 1991, Filed

As Corrected June 3, 1991

DICKINSON R. DEBEVOISE,
UNITED STATES DISTRICT JUDGE

I. THE PROCEEDINGS

In this action plaintiff, the United States of America, seeks to recover from defendant, Richard Steinmetz, a ship's bell taken from the celebrated Confederate warship, the CSS ALABAMA. In response to an order to show cause, Mr. Steinmetz delivered the bell to the Court. A hearing was held on January 4, 1991. The hearing not only developed evidence required to dispose of this case; it was also a celebrative event. The final encounter of the CSS ALABAMA was

recalled. Each student in the sixth grade of Maplewood's Middle School struck the bell bringing forth once again the vibrant tone heard many times at sea during the years 1862 to 1864.

Since the bell had been deposited in Court there was no need for preliminary injunctive relief. Mr. Steinmetz answered and counterclaimed, seeking (1) a determination that the bell is his property, (2) compensation on a theory of quantum meruit and (3) compensation on a theory of unjust enrichment. I suggested to the parties that they cross-move for summary judgment and, pending a hearing on the motion, seek to arrive at a fair and reasonable disposition of the case. Unfortunately, the efforts to reach agreement failed and it thus became necessary to rule upon cross-motions for summary judgment.

II. THE FACTS

Many events preceded the arrival of the bell in Newark. These events are recounted in the Official Records of the Union and Confederate Navies in the War of the Rebellion (Government Printing Office 1896), in the works of recognized historians of the Civil War, in the testimony in this case of Naval Historian William S. Dudley and in the testimony of Mr. Steinmetz, an antique dealer who has great expertise in the field of military artifacts. These events can be summarized as follows:

In 1847, fourteen years before the start of the Civil War, the American fleet was engaged in the war with Mexico. On one of the Navy's ships two officers shared a cabin, Lt. Raphael Semmes and Lt. John Winslow. In 1864 the paths of these two officers were to cross again.

In 1861 James D. Bulloch, representing the Confederate States of America, proceeded to England. His mission was to obtain ships for the Confederacy. Among other activities, he arranged for two warships to be built in Liverpool. One was the vessel named the Florida; the other was the ALABAMA.

Thomas S. Dudley was the United States Consul in Liverpool. His most important assignment was to seek enforcement of Britain's Foreign Enlistment Act which forbade the construction and arming of warships in British territory for a belligerent power. Despite Dudley's efforts the British authorities permitted the Florida to depart from Liverpool on the technical ground that she was not a warship since her arms were shipped out separately on another vessel.

James M. McPherson in his Battle Cry of Freedom describes the departure of the other ship, the ALABAMA, from Liverpool and its subsequent activities:

> The willingness of British officials to apply a narrow interpretation of the Foreign Enlistment Act encouraged Bulloch's efforts to get a second and larger cruiser out of Liverpool in the summer of 1862. In a contest of lawyers, spies, and double agents that would furnish material for an espionage thriller, Dudley amassed evidence of the ship's illegal purpose and Bulloch struggled to slip through the legal net closing around him by July. Once again bureaucratic negligence, legal pettifoggery, and the Confederate sympathies of the British customs collector at Liverpool

gave Bulloch time to ready his ship for sea. When an agent – informed him of the government's belated intention to delay the ship, Bulloch sent her out on a 'trial cruise' from which she never returned. Instead she rendezvoused at the Azores with a tender carrying guns and ammunition sent separately from Britain. Named the ALABAMA, this cruiser had as her captain Raphael Semmes, who had already proved his prowess as a salt-water guerrilla on the now defunct CSS Sumter. For the next two years Semmes and the ALABAMA roamed the seas and destroyed or captured 64 American merchant ships before meeting the USS Kearsage off Cherbourg in June of 1864.

In June of 1864 the ALABAMA entered the harbor of Cherbourg and obtained permission from the French authorities to land prisoners, dock the ship for repairs and take on supplies. Meanwhile, the USS Kearsage, under the command of Captain John Winslow, entered Cherbourg and then positioned herself in international waters beyond the harbor mouth.

Captain Semmes decided to do battle. By Saturday night, June 18, his preparations were complete. Between nine and ten o'clock on June 19 the ALABAMA proceeded to sea, accompanied by the French ironclad Frigate Couronne, some French pilot boats and the English steam yacht, the Deerhound. The Kearsage awaited seven miles off shore.

John Kell, executive officer of the ALABAMA, has described the battle:

We now prepared our guns to engage the enemy on our starboard side. When within a mile and a-quarter he wheeled, presenting his starboard battery to us. We opened on him with solid shot, to which he soon replied, and the action became active. To keep our respective broadsides bearing we were obliged to fight in a circle around a common center, preserving a distance of three quarters of a mile. When within distance of shell range we opened on him with shell. The spanker gaff was shot away and our ensign came down. We replaced it immediately at the mizzen masthead.

The firing now became very hot and heavy. Captain Semmes, who was watching the battle from the horse block, called out to me, "Mr. Kell, our shell strike the enemy's side, doing little damage, and fall off in the water; try solid shot." From this time we alternated shot and shell.

The battle lasted an hour and ten minutes. Captain Semmes said to me at this time (seeing the great apertures made in the side of the ship from their 11-inch shell, and the water rushing in rapidly), "Mr. Kell, as soon as our head points to the French coast in our circuit of action, shift your guns to port and make all sail for the coast." This evolution was beautifully performed; righting the helm, hauling aft the fore-trysail sheet, and pivoting

to port, the action continuing all the time without cessation, -- but it was useless, nothing could avail us.

Before doing this, and pivoting the gun, it became necessary to clear the deck of parts of the dead bodies that had been torn to pieces by the 11-inch shells of the enemy. The captain of our 8-inch gun and most of the gun's crew were killed. It became necessary to take the crew from young Anderson's gun to make up the vacancies, which I did, and placed him in command. Though a mere youth, he managed it like an old veteran.

Going to the hatchway, I called out to Brooks (one of our efficient engineers) to give the ship more steam, or we would be whipped.

He replied she "had every inch of steam that was safe to carry without being blown out!."

Young Matt O'Brien, assistant engineer, called out, "Let her have the steam; we had better blow her to hell than to let the Yankees whip us!"

The chief engineer now came on deck and reported, "the furnace fires put out," whereupon Captain Semmes ordered me to go below and "see how long the ship could float."

I did so, and returning said, "Perhaps

ten minutes."

"Then, sir," said Captain Semmes, "cease firing, shorten sail, and haul down the colors. It will never do in this nineteenth century for us to go down and the decks covered with our gallant wounded."

This order was promptly executed, after which the Kearsarge deliberately fired into us five shots! In Captain Winslow's report to the Secretary of the Navy he admits this, saying, "Uncertain whether Captain Semmes was not making some ruse, the Kearsarge was stopped."[1]

[1] Captain Semmes had acquired a reputation for resorting to ruses. Dr. Dudley testified:

". . . in the early part of the Alabama's career, the Alabama attacked . . . the USS Hatteras off the coast of Texas. . . . Semmes used a ruse, a ruse de geurre, a ruse of war where he pretended to be a British... ship Alabama had permitted the Hatteras to overhaul her . . . and Alabama says, send your boat. The Alabama people had been told reserve fire until you hear the word "Alabama." And Kell is told now . . . announce who we are. You are now approaching the Confederate States Steamer Alabama and blast away.

Now, that was a ruse, and it was that ruse that was commonly done. You often fly the flags of a different power to try to defraud your enemies, but word of this had gotten around and Winslow warned his men, we must be careful of the crafty dealer, clever Semmes. "

An account of the battle between Kearsarge and Alabama written by Arthur Sinclair IV, a lieutenant on the Alabama absolves Captain Winslow

(continued...)

> Was this a time, -- when disaster, defeat and death looked us in the face, for a ship to use a ruse, a Yankee trick? I ordered the men to "stand to their quarters," and they did it heroically; not even flinching, they stood every man to his post. As soon as we got the first of these shot I told the quarter-master to show the white flag from the stern. It was done. Captain Semmes said to me, "Dispatch an officer to the Kearsarge and ask that they send boats to save our wounded -- ours are disabled." Our little dingey was not injured, so I sent Master's Mate Fulham with the request. No boats coming, I had one of our quarter boats (the least damaged one) lowered and had the wounded put in her. Dr. Galt came on deck at this time, and was put in charge of her, with orders to take the wounded to the Kearsarge. They shoved off in time to save the wounded.

[1](...continued)
of deliberately firing upon a ship which had surrendered:

"It being now apparent that the Alabama could not float longer, the colors are hauled down, and the pipe given, 'All hands' save yourself. . . .' The Kearsarge evidently failed to discover at once our surrender, for she continued her fire after our colors were struck. Perhaps from the difficulty of noting the absence of a flag with so much white in it, in the powder smoke. But, be the reason what it may, a naval officer, a gentleman by birth and education, would certainly not be guilty of firing on a surrendered foe; hence we may dismiss the matter as an undoubted accident."

When I went below to inspect the sight was appalling! Assistant Surgeon Llewellyn was at his post, but the table and the patient on it had been swept away from him by an 11-inch shell, which made an aperture that was fast filling with water. This was the last time I saw Dr. Llewellyn in life. As I passed the deck to go down below a stalwart seaman with death's signet on his brow called to me. For an instant I stood beside him. He caught my hand and kissed it with such reverence and loyalty, -- the look, the act, it lingers in my memory still! I reached the deck and gave the order for "every man to save himself, to jump overboard with a spar, an oar, or a grating, and get out of the vortex of the sinking ship."

As soon as all were overboard but Captain Semmes and I, his steward, Bartelli, and two of the men -- the sailmaker, Alcott, and Michael Mars -- we began to strip off all superfluous clothing for our battle with the waves for our lives. Poor, faithful-hearted Bartelli, we did not know he could not swim, or he might have been sent to shore -- he was drowned. The men disrobed us, I to my shirt and drawers, but Captain Semmes kept on his heavy pants and vest. We together gave our swords to the briny deep and the ship we loved so well! The sad farewell look at the ship would have wrung the stoutest heart! The dead were lying on her decks, the surging, roaring waters rising through the death-wound in her side. The ship agonizing like a living

> thing and going down in her brave beauty, settling lower and lower, she sank fathoms deep -- lost to all save love, and fame, and memory! . . .

Captain Semmes, Lt. Kell and certain others of the ALABAMA's crew were picked up by the English yacht Deerhound. The Deerhound, despite assurances to Captain Winslow that she was merely assisting him in picking up the prisoners, took her new passengers to England. For allowing this to happen Captain Winslow was later officially reprimanded by Secretary of the Navy Gideon Welles.

It goes without saying that the ship's bell, which is the subject of this case, accompanied the ALABAMA as "she sank fathoms deep." The ALABAMA still rests where she sank, but the bell was salvaged. Mr. Steinmetz traced its separate history.

In 1979 Mr. Steinmetz participated in an antique gun show in London. A dealer informed him that he knew where the bell of the CSS ALABAMA was located, and Mr. Steinmetz asked to see it. The dealer took Mr. Steinmetz to Hastings on the English coast where an antique dealer, a Mr. Walker, showed him the bell and documentation concerning it. It purportedly came from the Isle of Guernsey off the French coast.

Mr. Steinmetz was skeptical, but he paid a deposit, took possession of the bell and proceeded to Guernsey to check it out.

Guernsey fishermen have a sideline -- wreck stripping. Mr. Steinmetz visited a Guernsey friend and the friend

introduced him to various persons who dealt in shipwrecks and salvage. When these persons were shown the bell they identified it as a bell which had hung in a Guernsey bar. It developed that a diver, William Lawson, had salvaged the bell in about 1936 and most likely had traded it at the bar for drinks. There it hung until World War II. The Germans captured Guernsey from the British. Thereafter, the bar was destroyed in a British bombing raid.

After the destruction of the bar the bell passed from hand to hand until it was acquired in 1978 by the Hastings antique dealer.

Satisfied with the authenticity of the bell, Mr. Steinmetz completed the purchase and brought it to the United States. He had given the dealer other antique items having a value of approximately $ 12,000 in exchange for the bell.

In 1979, after returning to the United States, Mr. Steinmetz offered the bell to the Naval Academy. The Academy was unwilling or unable to trade or purchase it. Mr. Steinmetz put the bell on a shelf until December 1990, at which time he placed it in the Harmer Rooke Gallery for auction.

The Bell was advertised in the Gallery's catalogue. Alert Naval authorities noticed the advertisement and claimed entitlement to the bell. Mr. Steinmetz resisted the claim, and this action ensued.

III. DISPOSITION OF SUMMARY JUDGMENT MOTIONS

Each party either has, or by direction of the court is deemed to have, moved for summary judgment. Judgment shall be rendered if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). There are no genuine issues as to any material facts and I conclude that as a matter of law the United States is entitled to a judgment in its favor.

A. *Right of Capture*. The bell is the property of the United States both by the right of capture and by virtue of the fact that the United States is successor to the rights and property of the Confederate States of America. Salvage rights cannot be asserted against the United States in this case under 46 U.S.C. § 781 because the two year limitation period has expired, 46 U.S.C. § 745, and the United States has not abandoned the CSS ALABAMA or any of its equipment.

Maritime law historically recognizes that the capture of an enemy's vessel confers title and ownership upon the captor. The Adventurer, 12 U.S. (8 Cranch) 221, 226 3 L. Ed. 2d. 542 (1814); The Alexander, 1 Gall. 532, 1 Fed. Cas. 357, No. 164 (1813), (Story, J.), aff'd, 12 U.S. (8 Cranch) 168 (1814). As observed by the United States Supreme Court in The Florida, 101 U.S. 37 25 L. Ed. 2d. 898 (1879):

> The title to captured property always vests primarily in the government of the captors.

Id. at 42.

Prior to its sinking, Captain Semmes of the CSS ALABAMA surrendered his vessel to USS KEARSARGE. Captain Semmes' act of surrender conferred upon the United States title and possession of CSS ALABAMA and all of her appurtenant equipment prior to its sinking. The undisputed historical record establishes that USS KEARSARGE captured CSS ALABAMA before the latter sank on June 19, 1864. KEARSARGE was in constructive possession of ALABAMA, positioned across ALABAMA' bow thwarting escape and able to deliver unanswerable raking fire.

B. *Right of Succession.* Also CSS ALABAMA is the property of the United States as the successor to all the rights and property of the Confederate Government. See J.B. Moore's Digest of International Law (1906), Vol. 1, Section 26. This principle was recognized by the English Courts in litigation following the Civil War in such cases as The Rappahannock (1866), 36 L.J. Adm. 9 and U.S. v. Prioleau (1865), 35 L.J. Chancery N.S. 7. Moore cites Prioleau in Section 26 on Succession in Case of Unsuccessful Revolt.

> The Confederate Government having been dissolved, and the Confederate states having submitted to the authority of the United States Government, the latter government filed a bill praying to have the cotton, which had arrived at Liverpool, delivered up to them, and for an injunction and receiver. . . . Upon motion for an injunction receiver, held that the property in question was now the property of the United States Government, but that they must take it subject to the obligations entered into

> respecting it by the de facto Confederate Government.

Moore's Digest at Section 26, p. 64. Moore also cites several instances where Confederate warships were surrendered to United States agents as property of the United States. Id. at 64, 65; see United States, Lyon, et al. v. Huckabee, 83 U.S. 414, 434-35, 21 L. Ed. 457 (1872).

C. *Lack of Abandonment*. Article IV, Section 3, Clause 2 of the United States Constitution provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Thus, under the above clause only Congress and those persons authorized by Congress may dispose of United States property pursuant to appropriate regulations.

In the similar case of Hatteras, Inc. v. USS HATTERAS, her engines, etc., in rem, and United States of America, in personam, 1984 AMC 1096, aff'd without opinion, 698 F.2d 1215 (5th Cir. 1982) involving a claim to the wreck of USS HATTERAS and artifacts from it, the District Court for the Southern District of Texas held that although the wreck had lain untouched since the Civil War, title and ownership of the wreck remained with the United States.

Citing numerous cases, the Court observed:

> It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials.

Id. at 1098.

Relying on United States v. California, 332 U.S. 19, 40, 1947 AMC 1579, 1595, 91 L. Ed. 1889, 67 S. Ct. 1658 (1947), the Court held that neither the maritime nor common law doctrine of abandonment was applicable to that case.

> While this traditionally conceived doctrine might prove dispositive of the factual questions in this case if it concerned a dispute between private citizens,
>
> > The Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act. United States v.

> California, 332 U.S. 19, 40, 1947 AMC 1579, 1595, 91 L. Ed. 1889, 67 S. Ct. 1658 (1947).

1984 AMC at 1098.

The Court determined that the HATTERAS wreck came under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471, et. seq. and that it was "foreign excess property" within the meaning of 40 U.S.C. § 512.

> Implicit in the statutory scheme of 40 U.S. Code, Section 512, is the requirement that, prior to any agency action, a determination be made whether the property proposed to be abandoned has any commercial value and, if so, whether the estimated cost of care and handling would exceed the estimated proceeds from its sale.

1984 AMC at 1100.

The United States has never formally abandoned the wreck of CSS ALABAMA. It is, therefore, in all respects similar to USS HATTERAS. It is a sunken wreck located in non-territorial waters. In view of this, the wreck, and by extension, the ship's bell, remain the property of the United States.

Moreover, the claim of the United States to title and ownership of the bell of CSS ALABAMA and its right to possess it are consistent with International Law regarding

warships sunk during armed conflict. It is the position of the United States Department of State that warships and their remains which are clearly identifiable as to the flag State of origin are clothed with sovereign immunity and therefore entitled to a presumption against abandonment of title. Digest of United States Practice in International Law, pp. 999-1006, (Dept. of State 1980).

After an extensive analysis of treaty law, commentaries, United States caselaw and foreign caselaw (See particularly pp. 1004-1005), the State Department concluded:

> Consequently, it is clear that under well-established State practice, States generally do not lose legal title over sunken warships through the mere passage of time in the absence of abandonment. They do not lose title during combat in the absence of an actual capture of the warships. Although abandonment may be implied under some circumstances, United States warships that were sunk during military hostilities are presumed not to be abandoned and are considered not subject to salvage in the absence of express consent from the United States Government.

Id. at 1005.

Moreover, the legislative history of the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106, effective April 28, 1988 supports the view of the State Department. House Report 100-514(I) (p. 366), U.S. Code Cong. & Adm.

News 365-385. The House Committee noted at pp. 366-68:

> the United States only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act. Passage of time or lack of positive assertions of rights are insufficient to establish such abandonment.

Later, in part II at page 374, discussing abandonment in general, warships are again excluded thusly:

> Except in the case of U.S. Warships or other public vessels (which requires an affirmative act of abandonment), the act of abandonment may be implied from the circumstances of the shipwreck. . . . [Emphasis supplied].

Clearly, warships are to be treated uniquely.

Thus, the lapse of time between the sinking of CSS ALABAMA and Mr. Steinmetz's acquisition of the ship's bell did not result in abandonment or the United States' loss of title to the ship and its equipment.

D. *The Counterclaim*. Mr. Steinmetz, by way of counterclaim, seeks the following alternative relief: a determination (1) that the bell is his property and that he is entitled to be paid its market value; (2) that he is otherwise entitled to compensation on a theory of quantum meruit; and (3) that he is entitled to compensation on the theory that the United States would be otherwise unjustly enriched.

To the extent that Mr. Steinmetz's first claim interposes his own claim of ownership in derogation of the

claim of the United States, he may properly assert it. For the reasons set forth above, however, I have concluded that Mr. Steinmetz's claim to ownership cannot be sustained.

I lack jurisdiction to entertain Mr. Steinmetz's second and third claims seeking compensation from the United States based on the theories of quantum meruit and unjust enrichment. Affirmative relief is sought without a showing that the United States has waived its sovereign immunity.

In United States v. Gregory Park, Section II, Inc., 373 F. Supp. 317 (D.N.J. 1974), the Court held with respect to counterclaims against the United States:

> The institution of suit by the United States [does not] comprise an implied waiver of sovereign immunity to afford affirmative relief. A specific waiver is required. (Citations omitted). Such provisions are not diluted by Fed.R.Civ.P. 13 permitting counterclaims to come within the court's ancillary jurisdiction, as Rule 13(d) specifically provides:
>
> > Counterclaim Against the United States. These rules shall not enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.
>
> However, notwithstanding plaintiff's sovereign immunity and Rule 13(d), defendant may assert a claim arising out of the same

> transaction or occurrence as the original claim by way of recoupment to reduce or defeat the Government's recovery. But such bases will not permit an affirmative recovery, which still requires an independent waiver of immunity. (Citations omitted) (Emphasis supplied).

Id. at 351. See also Frederick v. United States, 386 F.2d 481 (5th Cir. 1967) and United States v. Timmons, 672 F.2d 1373 (11th Cir. 1982).

In the instant action, the United States seeks a declaration of its title and ownership of the ship's bell of CSS ALABAMA and possession of the bell. Mr. Steinmetz in his first counterclaim seeks analogous relief. However, in his second and third counterclaims, he seeks affirmative relief against the United States in the form of monetary compensation without setting forth a statutory predicate of waiver of immunity which would permit him to receive such compensation. The Court, therefore, lacks jurisdiction to entertain Mr. Steinmetz's second and third counterclaims.

For these reasons, the United States is entitled to summary judgment on Mr. Steinmetz's first counterclaim and to a judgment of dismissal of his second and third counterclaims.

For the foregoing reasons the United States' motion for summary judgment must be granted and Mr. Steinmetz's motion for summary judgment must be denied. The United States is entitled to ownership and possession of the bell. I

shall prepare and file an appropriate order.[2]

[2] I expressed my view at the hearing that fairness and equity suggest that, regardless of the legal merits of the case, the United States should at least reimburse Mr. Steinmetz for his expenses in acquiring, shipping and preserving the bell, since through these efforts the bell has been returned to the American people.

The Navy notes that a sunken naval vessel is not only a repository of our nation's naval heritage, it is also a sacred place, a watery grave containing the bodies of the officers and men who went down with their ship. These vessels, though government property, are subject to disturbance from both amateur and professional divers and from fortune and souvenir hunters. To discourage this kind of desecration and to preserve these vessels for historical and public use, the Navy, as a matter of policy, refuses to pay for artifacts taken from its sunken vessels.

The Navy's concerns are both understandable and laudable. One would think, however, that in the unusual circumstances of this case some way could have been devised to make Mr. Steinmetz whole. But that, apparently, was more than the bureaucratic mind could accomplish.